

3-79

1 IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE
2 OF MONTANA, IN AND FOR THE COUNTY OF TETON

3 * * * * * No. 7118

4 A. B. GUTHRIE, JR.; ALICE)
5 GUTHRIE; KENNETH GLEASON; and) AMENDED
6 MONTANA WILDERNESS ASSOCIATION,)
7 Plaintiffs,) FINDINGS OF FACT
8 -vs-) AND
9 MONTANA DEPARTMENT OF HEALTH) CONCLUSIONS OF LAW
10 AND ENVIRONMENTAL SCIENCES; BOARD
11 OF COUNTY COMMISSIONERS, TETON)
12 COUNTY; J. R. CRABTREE; JAMES M.
13 CRAWFORD; and ROBERT W. JENSEN,)
14 Defendants.)

15 * * * * *

16 This action came on regularly for trial before the Court
17 without a jury on April 12, 1978, the Plaintiffs appearing in
18 person and represented by their attorneys, James H. Goetz and
19 Gregory Curtis; the Defendant Montana Department of Health and
20 Environmental Sciences appearing by its attorneys, Stan Bradshaw
21 and Sandra Muckelston; Defendant Board of County Commissioners of
22 Teton County appearing by its attorney, Charles Joslyn; and
23 Defendants Crabtree, Crawford, and Jensen represented by their
24 attorneys, Milton Wordal and Michael Anderson. Plaintiffs renewed
25 their motion to amend the complaint; the motion was granted. At
26 the end of the trial, April 18, 1978, parties were ordered to file
27 proposed findings of fact and conclusions of law within thirty (30)
28 days.

29 Based upon the evidence heard and the papers and documents
30 and exhibits filed, the Court makes the following:

31 FINDINGS OF FACT

- 32 1. Plaintiff, A. B. GUTHRIE, JR., is a real property owner
and resident of Teton County, Montana.
- 31 2. Plaintiffs, ALICE and KENNETH GLEASON, own and operate
32 a dude ranch approximately one (1) mile to the west of proposed

1 Arrowleaf West Subdivision in Teton County, Montana.

2 3. Plaintiff, MONTANA WILDERNESS ASSOCIATION, is a non-
3 profit corporation organized and operating under the laws of the
4 State of Montana, dedicated to the promotion of wilderness areas
5 and the advancement of environmental causes generally.

6 4. The MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL
7 SCIENCES and the State of Montana ("Department") is the agency
8 charged with the duty of administering Montana laws relating to
9 sanitation in subdivisions and water pollution, Sections 69-5001,
10 et seq., R.C.M. 1947. The Department has a mandate under R.C.M.
11 1947, Section 69-5005 to ensure, prior to approval of a proposed
12 subdivision, that there is an adequate water supply (in terms of
13 quality, quantity, and dependability); and that adequate provision
14 is made for sewage and solid waste disposal. Under that section,
15 the Department adopted regulations, M.A.C. 16-2.14(10)-S14340.
16 The Department adopted regulations dealing with subdivision review
17 in December, 1972. Those regulations have been amended at least
18 three (3) times since: November 4, 1973; November 3, 1975; and
19 May 6, 1976. The last amendment, May 6, 1976, is not here
20 pertinent because only minor changes were made. Nor is the
21 period between the initial enactment of the regulations (December,
22 1972) and the date of the first amendment (November 4, 1973) here
23 relevant because no review of the Arrowleaf West proposal took
24 place in that period.

25 5. Arrowleaf West Subdivision is a proposed subdivision
26 located in Teton County, Montana, in the east one-half of Section
27 33, the northwest quarter of Section 34, Township 25 North, Range
28 8 West, M.P.M., containing approximately 149.25 acres and is
29 proposed to be divided into approximately thirty-seven (37) lots
30 of between approximately two (2) acres to approximately 8.6 acres.
31 The general location of the proposed subdivision is approximately
32 twenty-four (24) miles northwest of Choteau, Montana. The

1 Arrowleaf West subdivision contemplates use of individual wells
2 and individual septic systems with drainfields for each lot.

3 6. On or about February 22, 1975, the Department
4 received the initial application of the Defendants Jensen,
5 Crawford and Crabtree.

6 7. The formal application for removal of the sanitary
7 restrictions from the Arrowleaf West subdivision (Form ES 91--
8 Plaintiff's Exhibit #12) was executed by the developers on
9 January 6, 1976, filed by the developers with the Department on
10 January 13, 1976, and the review fee was paid by the developers
11 to the Department on January 14, 1976.

12 8. The Department, in its review of the Arrowleaf West
13 subdivision, failed to require strict compliance with its regula-
tions on numerous points as follows:

15 a) Section 16-2.14(10)-S14340(4) M.A.C. requires that
16 a preliminary engineering report with cost estimates
17 be prepared for all subdivisions over 10 lots. No such
report was prepared.

18 b) Section 16-2.14(10)-S14340(2) requires that a
19 suitable plat be submitted by the developer to the
20 Department, showing topography, drainage ways, location
of sewage disposal systems and septic tanks. None of
these were depicted in the plat approved by the
Department.

21 c) Section 16-2.14(10)-S14340(6)(v) requires that
22 groundwater tests be made if there is any reason to
23 believe that groundwater will be within ten (10) feet
of the ground surface. While some of Arrowleaf West is
within ten (10) feet of the surface, the developers'
24 application (Form ES 91, Plaintiffs' Exhibit #12) did
not supply the requested information about the high
and low elevations of groundwater. Furthermore, Mr.
25 Al Keppner, an official of the Department, testified
26 that the soil borings done in December of 1975 would
not reflect the high groundwater levels which would be
likely to occur in the spring of the year.

27 d) Section 16-2.14(10)-S14340(5)(d) requires that a
28 well of at least twenty-five (25) feet be drilled on
29 each subdivision, and that a hydrogeological report
be prepared by an engineer verifying that there is
an adequate quantity of water. No well was drilled
30 on Arrowleaf West, nor was a report submitted.

31 e) Section 16-2.14(10)-S14340(6)(c)(iv) requires that
32 at least one percolation test be done for each lot in
a proposed subdivision. There are approximately 36 lots

1 proposed for Arrowleaf West, yet there were only sixteen
2 (16) percolation tests done (Plaintiffs' Exhibit #13C).
3 However, Keppner apparently waived this requirement in a
4 letter of June 17, 1975 (Plaintiffs' Exhibit #22).

5 9. The Department during the course of its review of the
6 Arrowleaf West subdivision conducted and filed an investigation of
7 the site of the subdivision in August, 1975, to determine among
8 other matters the degree of slopes.

9 10. The slowest drawdown rate of the eighteen (18) percola-
10 tion tests (with sixteen 16 results) was one (1) inch per thirty
11 (30) minutes.

12 11. The sixteen (16) soil boring tests on the site of the
13 Arrowleaf West subdivision were conducted by Mike Clasby to a
14 depth of ten (10) feet and groundwater was not encountered in any
15 of the tests.

16 12. The developers, although aware of the unpotable water
17 found in the wells drilled on the Arrowleaf East site and although
18 aware of the dry holes and unpotable water in the test holes drilled
19 on the Arrowleaf East site, conveyed none of this information to
20 the Department or to officials of Teton County.

21 13. The Department, throughout its review of the Arrowleaf
22 West subdivision, was unaware of any well drilling in the general
23 vicinity of Arrowleaf West which resulted in either dry holes or
24 unpotable water because such information was not supplied to it
25 by the developers. However, Ray Anderson, a well driller, testified
26 that he did not know that potable water would not be available on
27 any of the lots in Arrowleaf West.

28 14. The well logs from Arrowleaf East subdivision, pre-
29 viously approved by the Department, indicated that potable water
30 in adequate quantities had been found in the area.

31 15. On or about May 7, 1976, the Department completed and
32 circulated copies of the Department's preliminary environmental
33 review on the Arrowleaf West subdivision to interested members of

1 the public.

2 16. The preliminary environmental review indicated the
3 following:

4 a) That the subdivision may have a detrimental effect on
5 the migratory habits of mule deer and bighorn sheep.

6 b) That the five (5) wells developed on the 320 acres were
7 deemed adequate evidence that a water supply is available.

8 c) That soil profile test holes and percolation tests indi-
9 cate the soils are suitable for on-site sewage disposal and
10 that care must be exercised in locating drainfields on Lots 20
11 through 24 and Lots 26 through 30 in order to avoid the
12 steeper slopes.

13 d) That the proposed development will increase the re-
14 creational use of the area, but due to the vast amount of
15 public land, the impact will likely be moderate.

16 17. After issuance of the preliminary environmental review, the
17 Department did not receive further comment from the Fish and Game
18 Department.

19 18. Section 16-2.2(2)-P2020 (Rule III) M.A.C. is a regulation of
20 the Department which deals with the necessity of preparation of an En-
21 vironmental Impact Statement. Section 2 of that rule provides in part
22 as follows:

23 ...If the preliminary environmental review shows a potential
24 significant effect on the human environment, an Environmental
Impact Statement shall be prepared on that action.

25 19. Section 16-2.2(2)-P2020(3) also provides as follows:

26 The following are actions which normally require the prepara-
27 tion of an EIS: (a) the action may significantly affect enviro-
28 nmental attributes recognized as being endangered, fragile,
29 or in severely short supply; (b) the action may be either sig-
nificantly growth inducing or inhibiting; or (c) the action
may substantially alter environmental conditions in terms of
quality or availability.

30 20. On the basis of the preliminary environmental review
31 and the comments on the preliminary environmental review received
32 by the Department, the Department determined that an environmental

1 impact statement was not necessary under the Montana Environmental
2 Policy Act (Section 69-6501 et seq., R.C.M. 1947) for the Arrow-
3 leaf West subdivision prior to the lifting of sanitary restrictions.

4 21. That, on or before June 6, 1976, the Department issued
5 a certificate which approved the plat, plans and specifications
6 of the Arrowleaf West subdivision and removed sanitary restrictions
7 from the subdivision, and the certificate contained the following
8 conditions which were imposed by the Department to protect the
9 quality of water in the vicinity of the subdivision:

10 THAT the lots sizes as indicated on the plat to be filed
11 with the county clerk and recorder will not be further
altered without approval, and,

12 THAT the lots shall be used for single-family dwellings,
and,

13 THAT the individual water system will consist of a
drilled well constructed in accordance with the criteria
14 established in MAC 16-2.14(10)-S14340 to a minimum of
15 30 feet, and,

16 THAT the individual sewage disposal systems will consist
of a septic tank and subsurface drainfield of such size
17 and capacity as set forth in MAC 16-2.14(10)-S14340, and,

18 THAT each subsurface drainfield shall have a minimum
absorption area of 160 square feet per bedroom, and,

19 THAT the bottom of the drainfield shall be at least
20 four (4) feet above the water table, and,

21 THAT no sewage disposal system shall be constructed
within 100 feet of the maximum highwater level of a
22 100 year flood of any stream, lake, watercourse, or
irrigation ditch, and,

23 THAT plans for the proposed water and individual sewage
24 systems will be reviewed and approved by the Teton
County Health Department before construction is started,
25 and,

26 THAT no structure requiring domestic water supply or
a sewage disposal system shall be erected on Lot 12,
27 and,

28 THAT the developer shall provide each purchaser of
property with a copy of plat and said purchaser shall
29 locate water and/or sewage facilities in accordance
therewith, and,

30 THAT instruments of transfer for this property shall
31 contain reference to these conditions, and,

32 THAT departure from any criteria set forth in MAC

1 16-2.14(10)-S14340 /sic/ when erecting a structure and
2 appurtenant facilities in said subdivision is grounds
3 for injunction by the Department of Health and Environ-
4 mental Sciences.

5 22. That testimony of Dr. Donald R. Reichmuth indicated
6 he made only two (2) visits to the site of the Arrowleaf West
7 subdivision, did not perform any chemical analysis of soil or
8 subsurface water, did not perform a soil profile analysis, and
9 did not perform any percolation tests, groundwater tests, or any
10 other subsurface investigation.

11 23. That Dr. Reichmuth was unable to state that the sub-
12 division would result in groundwater contamination.

13 24. That Reichmuth's testimony did not preclude avail-
14 ability of an adequate area on each lot in the Arrowleaf West
15 subdivision for location of a septic tank system and drainfield
16 which met the requirements of the rules promulgated pursuant to
17 the Sanitation in Subdivisions Act.

18 25. That Al Keppner testified that lift stations can be
19 utilized in sewage disposal systems and such utilization is not
20 prohibited by the Sanitation in Subdivisions Act and rules
21 promulgated pursuant thereto.

22 26. That the conditions placed on the Arrowleaf West
23 subdivision by the Department of Health and Environmental Sciences
24 in its certificate provided that individual water and sewage
25 disposal systems installed in the subdivision must meet the
26 requirements of the Sanitation in Subdivision rules, and must be
27 reviewed and approved by the Teton County Health Department
28 before construction of the systems.

29 27. That the requirement of each subsurface drainfield's
30 absorption area stated in the Department's certificate exceeded
31 the minimum requirements of Bulletin 332, April 1969, Table III
32 for the slowest absorption rate of the eighteen percolation tests.

28. The area containing Arrowleaf West is within the

1 boundaries of an area tentatively designated by the United States
2 Fish and Wildlife Service as critical grizzly bear habitat under
3 the Federal Endangered Species Act.

4 29. There have been approximately three (3) to four (4)
5 sightings of the Northern Rocky Mountain Wolf within an
6 approximate ten (10) mile radius of the proposed subdivision.
7 The Northern Rocky Mountain Wolf is listed as an endangered
8 species under the Federal Endangered Species Act.

9 30. Other wildlife, such as mountain goats, elk, and deer,
10 frequent the general area in the vicinity of Arrowleaf West
11 subdivision.

12 31. There is no evidence to show that the actions of the
13 Teton County Commissioners brought about any irreparable injury
14 to the plaintiffs, to the Montana Wilderness Association or
15 individual members of the Wilderness Association. Plaintiffs
16 failed to show the damages, if any, are distinguishable from any
17 injuries to the public generally.

18 32. On June 30, 1975, an application for approval of the
19 Arrowleaf West preliminary subdivision plat was made to the Teton
20 County Planning Board by Robert W. Jensen, one of the partners
21 in the subdivision.

22 33. On July 1, 1975, the Teton County Planning Board
23 published a notice of a public hearing on a preliminary plat for
24 the Arrowleaf West subdivision. The hearing notice was for a
25 hearing to be held on the 19th day of August, 1975, at the
26 Courtroom in Choteau, Montana, at 7:30 o'clock P.M.

27 34. The Teton County Planning Board caused a notice of
28 the said hearing to be mailed by registered letter to certain
29 people, including landowners in the area of the proposed sub-
30 division.

31 35. That, although the Plaintiffs Guthrie and Gleason
32 appeared at the hearing of the Teton County Planning Board on

1 August 19, 1975, they did not raise any question about any lack
2 of notice of the hearing or any authority of the Planning Board
3 to hold a hearing on behalf of the Defendant Board of County
4 Commissioners of Teton County. The Montana Wilderness Society
5 did not appear at the public hearing.

6 36. On August 9, 1975, at 7:30 o'clock P.M. in the Court-
7 room in the Teton County Courthouse, the Planning Board held a
8 hearing on the proposed subdivision known as Arrowleaf West,
9 during which there was a substantial amount of public disapproval
10 of the subdivision.

11 37. In a letter dated October 14, 1975, John R. Nauck,
12 secretary of the Teton City-County Planning Board, indicated to
13 Defendant Jensen that the Arrowleaf West Preliminary Plat was
14 approved by the Teton City-County Planning Board subject to the
15 conditions set forth in the September 2, 1975 minutes of the
16 Board and subject to the approval of the ES 91 form by the
17 Department.

18 38. The Montana Subdivision and Platting Act, Section 11-
19 3859 et seq. R.C.M. 1947, requires that a governing body of a
20 county must, prior to approval of a subdivision application, find
21 that the subdivision as proposed is in the public interest and
22 shall issue written findings of fact that weigh itemized criteria
23 relating to the public interest. On January 19, 1976, the Board
24 of County Commissioners of Teton County considered the approval
25 of Arrowleaf West subdivision and did not make written findings
26 of fact at that time, although the evidence indicates the Board
27 did consider the criteria set out in Section 11-3866(4), R.C.M.
28 1947.

29 39. On September 20, 1976, the Board of County Commissioners,
30 Teton County, made and entered written findings which weighed the
31 criteria set forth in Section 11-3866(4), R.C.M. 1947, and ordered
32 that the minutes of the meeting of January 19, 1976, be amended to

1 approve the preliminary plat of Arrowleaf West subdivision.

2 From the foregoing FINDINGS OF FACT, the Court makes the
3 following:

4 CONCLUSIONS OF LAW

5 1. That all findings of fact stated above which may be
6 stated as conclusions of law are incorporated into these con-
7 clusions of law by this section.

8 2. That the rules implementing the Sanitation in Sub-
9 division Act, Section 69-5001 et seq. R.C.M. 1947, are aids to the
10 exercise of the independent discretion of the Department of
11 Health and Environmental Sciences and, in both language and
12 purpose, permit the Department to require substantial compliance.

13 3. That the action of the Department of Health and Environ-
14 mental Sciences in reviewing, approving and lifting the sanitary
15 restrictions from the Arrowleaf West subdivision, and in imposing
16 conditions to protect water quality was in compliance with the
17 Sanitation in Subdivision Act, Section 69-5001 et seq. R.C.M. 1947,
18 and its implementing rules.

19 4. That the Arrowleaf West subdivision will not injure
20 the plaintiffs in any of the following particulars:

- 21 (1) water pollution;
- 22 (2) loss of aesthetic values;
- 23 (3) loss of recreational values;
- 24 (4) damage to the area for the suitability of the
25 operation of a dude ranch; or
- 26 (5) other economic, personal, and aesthetic consequences
27 of the Arrowleaf West subdivision.

28 5. That the review, approval and lifting of sanitary res-
29 trictions from the Arrowleaf West subdivision by the Department of
30 Health and Environmental Sciences complied with the requirements
31 of the Montana Environmental Policy Act, Section 69-6501 et seq.
32 R.C.M., 1947.

1 6. That the decision of the Department of Health and En-
2 vironmental Sciences that an environmental impact statement was
3 not required is reasonable and consistent with the Montana En-
4 vironmental Policy Act and its implementing rules.

5 7. That the action of the Department of Health and Envir-
6 onmental Sciences in reviewing, approving, and lifting the sani-
7 tary restrictions from the Arrowleaf West subdivision is not a
8 major state action significantly affecting the quality of the human
9 environment.

10 8. That the review and approval by the Department of Health
11 and Environmental Sciences of the Arrowleaf West subdivision com-
12 plies in both spirit and letter with the requirements of Article II,
13 Section 8, of the 1972 Constitution of Montana.

14 9. That the Arrowleaf West subdivision will not cause the
15 Plaintiffs to suffer irreparable injury and damage.

16 10. That the Plaintiffs have failed to prove harm or damage
17 by the Defendant Department of Health and Environmental Sciences
18 in its approval of the Arrowleaf West subdivision.

19 11. That the evidence before this Court and the law warrant
20 judgment generally in favor of the Defendants and against the
21 Plaintiffs.

22 12. Section 11-3866, R.C.M. 1947, requires that a governing
23 body or its authorized agent or agency hold a public hearing on a
24 preliminary plat. The hearing by the Teton County Planning Board
25 on the Arrowleaf West subdivision met the requirement of the section.

26 13. The Teton County Planning Board is the authorized agent
27 or agency for the governing body, the Teton County Board of County
28 Commissioners.

29 14. That the prerequisite notices of the hearing were given
30 as required by Section 11-3866, R.C.M. 1947.

31 15. That the only issues properly raised by Plaintiffs'
32 complaint in respect to the Defendant Board of County Commissioners

1 is whether or not a public hearing was held as required by law on
2 the preliminary plat of Arrowleaf West subdivision after the re-
3 quired notice. The Defendants objected to any evidence beyond the
4 scope of the complaint. The Plaintiffs sought to go beyond the
5 scope of the complaint in regard to the basis for the Defendant
6 Board's approval of the subdivision. The objection is well founded
7 and the Court ought not consider any of the evidence beyond the
8 scope of the complaint.

9 16. That had Plaintiffs taken issue with the method the
10 Defendant Board used in weighing the criteria set forth in Section
11 11-3866, R.C.M. 1947, the Court concludes that the proper procedure
12 would have been for Plaintiffs to allege and prove that the Defen-
13 dant Board's actions were fraudulent or so arbitrary as to amount
14 to a clear and manifest abuse of discretion. State ex rel Bowler
15 v. Board of Commissioners of Daniels County, 106 Mont. 251, 76 P.2d
16 648.

17 17. The Court cannot conclude as a matter of law that the
18 Defendant Board's actions in approving Arrowleaf West subdivision
19 were contrary to the law. The courts are without power to inter-
20 fere with the discretionary actions of a board within the board's
21 authority. State ex rel Bowler v. Board of Commissioners of
22 Daniels County, supra. The actions of the Board of County Commis-
23 sioners in approving the Arrowleaf West subdivision were within
24 the discretion of the Board as a matter of law.

25 18. The Defendant Board has legal authority to amend its
26 minutes and the Board's Amendment of September 20, 1976, to the
27 minutes of January 19, 1976, is within the power and authority of
28 the Board and is in all respects proper.

29 19. Section 11-3866(2), R.C.M. 1947, requires a governing
30 body to approve, conditionally approve or reject a preliminary
31 plat within sixty (60) days of its presentation unless the
32 subdivider consents to an extension of the review period.

1 Subsection (4) of Section 11-3866 is unclear on any time limit for
2 the issuance of written findings of fact. The Court concludes that
3 a subdivider can consent to any extension of time for the review
4 process by the County governing body. In this case, the time
5 involved was not contrary to Section 11-3866(2).

6 20. The Plaintiff's argument is with the effects of
7 subdivision, regardless of the legality of the approval. The
8 Plaintiff's testimony on the effects of the subdivision on
9 Plaintiffs has to do with the subdivision, regardless of the
10 procedure involved in the approval of the subdivision by the
11 governing body of Teton County. Therefore, the Court cannot
12 conclude the Plaintiffs have suffered damages or injury as a re-
13 sult of the Defendants' actions. The Court concludes that
Plaintiffs have not demonstrated irreparable harm.

15 21. Section 93-4204.1, R.C.M. 1947, evidences to the Court
16 an intent by the legislature that members of a citizens group
17 must show an injury which is distinguishable from an injury to the
18 public generally to obtain injunctive relief. The Court concludes
19 that the Plaintiff Montana Wilderness Society, did not meet this
20 burden. The Court cannot conclude that any injury would be
21 suffered by the Montana Wilderness Society or its members that is
22 distinguishable from an injury to the public generally. The
23 general public has the same rights in the area as that of Plaintiffs.

24 The Court concludes that Plaintiffs' request for an injunction
25 should be denied.

26 LET JUDGMENT BE ENTERED ACCORDINGLY.

27 DATED this ____ day of March, 1979.

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29
30 R. D. McPHILLIPS, DISTRICT JUDGE